

Hartvig v. Merz, BAP No. 94-2097-AsVH
Adv. No. 93-3578

In re Floating Point Systems, Case No. 391-36490-P7

7/27/95 BAP unpublished

Affirming Judge Perris

The trustee sought to recover certain payments to Merz under 11 U.S.C. § 547. Merz raised an ordinary course of business defense under § 547(c)(2). The bankruptcy court struck the portion of Merz' affidavit stating that the debts were incurred and the payments were made in the ordinary course of the debtor's business. The court then found no evidence to support the § 547(c)(2) defense and entered judgment for the trustee.

On appeal, the BAP affirmed the bankruptcy court's decision to strike the portion of the affidavit, determining that the statements were legal conclusions without adequate foundation and not based on personal knowledge under Fed. R. Evid. 602. There being no admissible evidence as to whether the debts were incurred and the payments were made in the ordinary course of business, the BAP determined that Merz failed to satisfy his burden of establishing the elements of section 547(c)(2).

NOT FOR PUBLICATION

FILED

JUL 27 1995

NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

CLERK, U.S. BANKRUPTCY COURT
DISTRICT OF OREGON

JUL 27 1995

LODGED REC'D
PAID DOCKETED

In re)
)
FLOATING POINT SYSTEMS, INC.,)
dba FPS Computing, an Oregon)
corporation,)
)
Debtor(s).)
)
CHRIS MERZ, dba Wholesale)
Reprographics,)
)
Appellant,)
)
v.)
)
DONALD H. HARTVIG, Trustee,)
)
Appellee.)

BAP No. OR-94-2097-AsVH
BK. No. 391-35490-elp7
Adv. No. 93-3578

MEMORANDUM

Argued and Submitted on
June 20, 1995 at Portland, Oregon

Filed - JUL 27 1995

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Elizabeth L. Perris, Bankruptcy Judge, Presiding

Before: ASHLAND, VOLINN, and HAGAN, Bankruptcy Judges.

1 Chris Merz appeals from a judgment in favor of the Chapter 7.
2 trustee. The bankruptcy court granted the trustee's summary
3 judgment motion after it granted the trustee's motion to strike a
4 portion of an affidavit of Mr. Merz for lack of proper foundation.
5 We affirm.

6
7 **STATEMENT OF THE FACTS**

8 In July 1991 Floating Point Systems, Inc. made four transfers
9 to Wholesale Reprographics, a business owed by Appellant Chris
10 Merz. On October 7, 1991 Floating Point filed a voluntary petition
11 under Chapter 11 of the Bankruptcy Code. The case was later
12 converted to one under Chapter 7 and Donald H. Hartvig was
13 appointed the Chapter 7 trustee.

14 The trustee filed a complaint against Wholesale Reprographics
15 to recover the preferential transfers; the complaint was later
16 amended to include Chris Merz as a defendant. The defendant
17 answered and asserted the ordinary course of business as an
18 affirmative defense pursuant to § 547(c)(2) of the Bankruptcy Code.
19 The trustee moved for summary judgment on the complaint.

20 The bankruptcy court granted the trustee's motion for summary
21 judgment with respect to the § 547(b) preference issues. However,
22 the court did not grant the trustee summary judgment on the
23 § 547(c)(2) ordinary course of business defense. The trustee made
24 a second motion for summary judgment on the affirmative defense
25 issues arising under § 547(c)(2).

26 Mr. Merz opposed the summary judgment motion and submitted his

1 affidavit in support of the opposition. The trustee moved to
2 strike certain portions of the affidavit. The court conducted a
3 hearing on the motion, granting it in part. The language of the
4 affidavit that was stricken stated that the debts were incurred "in
5 the ordinary course of business or financial affairs of the debtor"
6 and that the transfers were made "in the ordinary course of
7 business or financial affairs of the debtor" and "according to
8 ordinary business terms." See, Appellant's E.R. 76 and 83.

9 The court further granted the trustee's second motion for
10 partial summary judgment on the basis that there was no evidence to
11 support the ordinary course of business defense once the relevant
12 portions of Mr. Merz' affidavit were stricken. Judgment was
13 entered against Mr. Merz for \$22,280 plus interest, sanctions, and
14 costs. He timely appealed the judgment.

15 16 ISSUE ON APPEAL

17 Whether the bankruptcy court erred in granting the motion to
18 strike a portion of the affidavit of Chris Merz for lack of proper
19 foundation and whether the court erred in granting the trustee's
20 second motion for partial summary judgment.

21 22 STANDARD OF REVIEW

23 The grant of a motion to strike is an evidentiary ruling
24 reviewed for an abuse of discretion. United States v. McClintock,
25 748 F.2d 1278, 1291 (9th Cir. 1984), cert. denied, McClintock v.
26 United States, 474 U.S. 822 (1985). Such a ruling will not be

1 reversed absent some prejudice. Kisor v. Johns-Manville Corp., 783
2 F.2d 1337, 1340 (9th Cir. 1986), citing, Coursen v. A.H. Robins
3 Co., Inc., 764 F.2d 1329, 1333 (9th Cir. 1985).

4 The grant of a summary judgment motion is reviewed de novo.
5 In re Kroy (Europe) Ltd., 27 F.3d 367, 368 (9th Cir. 1994); In re
6 Ramsey, 176 B.R. 183, 186 (9th Cir. BAP 1994). Viewing the
7 evidence in a light most favorable to the nonmoving party, we must
8 determine whether there are any genuine issues of material fact and
9 whether the trial court applied the correct legal standard. In re
10 Kemp Pacific Fisheries, Inc., 16 F.3d 313, 315 (9th Cir. 1994).

11 12 DISCUSSION

13 Federal Rule of Evidence 602 requires that a witness have
14 personal knowledge of the facts which are asserted to be offered
15 into evidence. The rule states that it is subject to the
16 provisions of FRE 703, relating to opinion testimony by expert
17 witnesses. Although an expert can testify to opinion based upon
18 facts of which he does not have personal knowledge, a lay person's
19 opinion testimony is not admissible unless a foundation for
20 personal knowledge is established.

21 The trustee's motion to strike sought to strike the following
22 language in Mr. Merz' affidavit:

23 / / /

24 / / /

25 / / /

26 / / /

1 The payments referenced in Plaintiff's Complaint ...
2 were payments of a debt incurred by debtor FPS in
3 the ordinary course of business or financial affairs
4 of FPS and Wholesale Reprographics, and they were
5 made in the ordinary cours(sic) of business or
6 financial affairs of debtor FPS Computing and
7 Wholesale Reprographics, and they were made
8 according to ordinary business terms.

9 Appellant's E.R. 76:13-22.

10 The above statements are legal conclusions that lack adequate
11 foundation and are, therefore, inadmissible. Select Creations,
12 Inc. v. Paliafito America, Inc., 852 F. Supp. 740, 744 n.5 (E.D.
13 Wis. 1994). The statements further constitute improper opinion
14 testimony. Mr. Merz is not testifying as an expert so must,
15 therefore, prove that he has personal knowledge of the facts or
16 opinion he is offering into evidence. Mr. Merz contends in his
17 affidavit that he acquired personal knowledge concerning whether
18 the payments were made or incurred in the ordinary course of
19 business or in accordance with ordinary business terms through
20 conversations with "Joel Brodie of the San Diego office of FPS, and
21 Bob Dries, Purchasing Manager for FPS, located in their Beaverton
22 area office." Appellant's E.R. 76:7-9. The conversations with
23 these people do not qualify as Mr. Merz' personal knowledge.
24 Furthermore, to the extent that Mr. Merz is testifying to the
25 statements made by these men, and offering these statements for the
26 truth of the matter asserted, the testimony would be inadmissible
as hearsay.

Therefore, the bankruptcy court did not abuse its discretion
in granting the trustee's motion to strike the above testimony of

1 Mr. Merz. Based on the foregoing, the bankruptcy court was further
2 correct in granting the trustee's second motion for partial summary
3 judgment.

4 In order to prove his ordinary course of business defense, Mr.
5 Merz held the burden to establish each of the elements of
6 § 547(c)(2). In re Seawinds, Ltd., 91 B.R. 88, 91 (9th Cir. BAP
7 1989), adopted, 888 F.2d 640 (9th Cir. 1989). To defeat the
8 trustee's motion for summary judgment, Mr. Merz would either have
9 had to show that there was a material question of fact or that he
10 should prevail on the relevant questions of law. Here, the facts
11 were not in dispute and once the trial court struck the
12 inadmissible portion of Mr. Merz affidavit, there was no evidence
13 relating to the ordinary course of business defense. Without such
14 evidence, there was no basis for Mr. Merz' affirmative defense
15 pursuant to § 547(c)(2).

16 Mr. Merz argued at oral argument that the trustee submitted no
17 affidavit to contradict the evidence presented by Mr. Merz.
18 However, there was no need for the trustee to submit such an
19 affidavit. Mr. Merz held the burden to prove his affirmative
20 defense and did not meet that burden.

21 It should be noted that this panel was not provided a copy of
22 the transcript of the July 19, 1994 hearing which Judge Perris
23 stated contained the court's oral findings. However, the panel
24 independently finds a basis to affirm the court's grant of the
25 summary judgment motion.

26 The Chapter 7 trustee requested attorney fees for this appeal

1 under Federal Rule of Appellate Procedure 38. We decline to deem
2 this appeal frivolous and, therefore, do not award the trustee his
3 attorney fees.

4
5 CONCLUSION

6 Based upon the forgoing, the judgment of the bankruptcy court
7 is affirmed.